80-1326

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ALEXANDER L. STEVAS,
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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

THERESA C. SANDERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented for Review.

1. Whether Petitioner was denied Due Process of Law as guaranteed by the United States Constitution when, during jury deliberations, the bailiff informed the jurors that they would be required to return on the following Monday if they failed to reach a verdict by 4:00 P.M. on Friday, where the jury reached its verdict at 3:50 P.M. on said day, and where the trial court failed to inquire into the effect of said communication upon the deliberations of the jury.

2. Whether Petitioner was denied Due Process of Law as guaranteed by the United States Constitution when the trial court failed to give cautionary accomplice instructions sua sponte despite the fact that the status of the witness as an accomplice was apparent, despite the fact that the accomplice testimony was the only direct evidence of guilt, despite the fact that absent such accomplice testimony no conviction could have been had, but where the United States Court of Appeals for the Ninth Circuit found there to exist some corroboration of the accomplice testimony.

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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

THERESA C. SANDERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, THERESA C. SANDERS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered December 8, 1980, affirming her conviction under 18 U.S.C. § 641, 18 U.S.C. § 495 and 18 U.S.C. § 1708, and that on hearing the judgment of conviction be reversed.

Opinions Below.

The opinion of the Court of Appeals (App. 1) is reported in an unpublished opinion, No. 79-1784, decided December 8, 1980.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 8, 1980. This court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions.

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

18 U.S.C. 641:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or to the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

'Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

'Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100 he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

'The word ''value'' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.' ''

18 U.S.C. 495:

''Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

'Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

'Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

'Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.' ''

18 U.S.C. 1708:

''Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package,

bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

'Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

'Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken embezzled, or abstracted—

'Shall be fined not more than $2,000 or imprisoned not more than five years, or both.' "

Statement of the Case.

This is a Petition for Writ of Certiorari after an appeal in United States Courts of Appeals for the Ninth Circuit was denied. Said appeal was from a conviction in the United States District Court for the Central District of the State of California of two counts of violation of Federal laws, for which Petitioner was granted five years probation and was required to pay restitution in the sum of $5,175.73.

On August 24, 1979, a 37 count indictment was filed charging Petitioner, in Count I, with conspiring to violate Title 18 U.S.C. § 641, and Title 18 U.S.C. § 495, by the theft of United States Treasury checks and the attempted and actual false endorsement of the payees thereon. Count II charged Petitioner with violation of Title 18 U.S.C. § 1708, by theft of letters containing United States Treasury checks. Count 37 of said indictment charged Petitioner with

violation of Title 18 U.S.C. § 1708, by unlawfully having in her possession the contents of letters which were stolen from the mail.

Petitioner pled not guilty as to all counts. On November 2, 1979, after trial by jury, Petitioner was found guilty respecting Counts I and II only.

On November 27, 1979, Petitioner filed a Motion for New Trial, and said motion was denied on November 30, 1979.

During the trial, an accomplice, SHIRLEY EDWARDS, testified that Petitioner gave her certain treasury checks which had been stolen by Petitioner from her place of employment, the United States Post Office. She testified further concerning the manner in which she cashed the checks.

Other witnesses testified as to the manner in which the stolen treasury checks were transported and received by the post office and established that Petitioner had access to the checks.

An individual, COLUMBUS MACKEY, JR., testified that he received the stolen checks from SHIRLEY EDWARDS and cashed them at his liquor store.

Agents of the Secret Service testified that Petitioner made certain inconsistent statements concerning the manner in which she paid the bail for Petitioner's son who had been incarcerated. Petitioner explained the inconsistencies.

No person observed Petitioner with the stolen checks other than the accomplice, SHIRLEY EDWARDS. Furthermore, her fingerprints were not found on any of the checks.

Defense counsel did not request an instruction regarding accomplices and no such instruction was given by the court sua sponte.

At approximately 11:15 A.M., on Friday, November 2, 1979, the jury commenced deliberations. The trial judge informed the bailiff that the jury would be dismissed at 4:00 P.M. due to other engagements of the Judge. At approximately 3:15 P.M., the bailiff relayed such information to the jury. Upon inquiry by one of the jurors as to the consequences of their failure to reach a verdict by that time, the bailiff informed the jurors that they would be required to return on the following Monday. The jury reacted disfavorably to this proposition.

At the time the bailiff originally informed the jury of the consequences of delay, the foreman informed the bailiff that the jury would probably be required to return on the following Monday.

At approximately 3:50 P.M., the bailiff returned to the jury to inform them they could deliberate longer on Friday. The bailiff was informed at that time that the jury had reached its verdict before the bailiff had the opportunity to tell the jurors that they could deliberate longer.

The District Court of Appeals for the Ninth Circuit affirmed the conviction in a memorandum opinion (App. 1).

Petitioner seeks review of the affirmance of the conviction and sentence, and outright reversal of the conviction.

ARGUMENT.

1. A Communication by a Bailiff to the Jury Which Tends to Hasten Their Verdict Is Inherently Coercive, and Such Communication Creates a Minimal Duty on the Part of the Trial Court to Investigate the Effect of Such Coercion Upon the Jury's Decisional Process—Particularly Where, as Here, the Jury's Conduct in Conformity With the Coercion Implies an Effect Upon Their Decisional Process.

In the case at bar, the bailiff advised the jury of the negative consequences of failing to reach a verdict at 4:00 P.M. The jurors did in fact reach a verdict at approximately 3:50 P.M. The coincidence between the time of reaching a verdict and the time stated by the bailiff implies that the jury was in fact influenced by such coercion.

Private communications between the jury and the officer in charge are absolutely forbidden unless their harmlessness is made to appear. (*Mattox v. United States*, 146 U.S. 140 (1892); *Morgan v. United States*, 399 F. 2d 93, 97 (5th Cir.), cert. denied, 393 U.S. 1025 (1968); *Little v. United States*, 331 F. 2d 287, 295 (8th Cir.), cert. denied, 379 U.S. 384 (1964); *Mee v. United States*, 316 F. 2d 467 (5th Cir.), cert. denied, 377 U.S. 997, reh. denied, 379 U.S. 873 (1963); *Sunderland v. United States*, 19 F. 2d 202, 212 (8th Cir. 1927); *Stone v. United States*, 113 F. 2d 524 (2d Cir.), cert. denied, 324 U.S. 867, reh. denied, 325 U.S. 892 (1944).)

Statements of the bailiff or of the court to the jury tending to influence their verdict have repeatedly been held sufficient for reversal. (*Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff told juror that defendant was a wicked fellow and guilty; told another juror that appellate court would correct any errors the jury might make); *Jenkins v. United States*,

380 U.S. 445 (1965) (coercive effect of statement by judge that jury must reach a verdict); *Wheaton v. United States*, 133 F. 2d 522 (8th Cir. 1943) (bailiff told jury that if they failed to reach a verdict they would be required to stay until the following day—the fact that the jury reached a verdict soon after the statement implied coercion); *United States v. Dellinger*, 472 F. 2d 340 (5th Cir.), cert. denied, 410 U.S. 970 (1973) (fact that jury verdict came in close temporal proximity to hung jury message indicated prejudice).)

Furthermore, the court may not, through the medium of the bailiff, fix a specific time within which the jury must return a verdict or otherwise coerce the verdict. (*United States v. Grosso*, 358 F. 2d 154, 158 (3rd Cir. 1965), reversed on other grounds, 390 U.S. 62; *Henderson v. United States*, 204 F. 2d 126 (6th Cir.), cert. denied, 349 U.S. 920, reh. denied, 349 U.S. 969 (1952) (communication of a judge through the medium of the bailiff was improper); *United States v. Contreras*, 463 F. 2d 773 (9th Cir. 1972) ("Allen" charge given prior to time jury indicated it was deadlocked was premature); *Goff v. United States*, 446 F. 2d 623 (10th Cir. 1971) (judge may not fix a specific time within which the jury must return a verdict).)

The within court should accept this matter for further argument and briefing in order to clarify existing principles respecting jury coercion thereby exercising its supervisory function respecting the federal judicial system. In particular, this court should establish more precise guidelines concerning what acts constitute jury coercion. Further, this court should examine the effect of a jury apparently acting in conformity with the coercive influence. Does such a coincidence between the coercive influence and the actions of the jury impose a minimal duty on the trial court to investigate further?

2. Where the Testimony of a Single Individual Who Was Clearly an Accomplice Is the Primary Evidence of Guilt, Where Such Testimony Is Only Indirectly Corroborated Respecting the Participation of Petitioner, the Trial Court Should Be Required to Give Cautionary Accomplice Instructions Sua Sponte.

The United States Supreme Court has heretofore remained virtually silent regarding the question of whether, or under what circumstances, a cautionary instruction relating to accomplice testimony is required, and whether, or under what circumstances, the omission of such an instruction is prejudicial or plain error.

Petitioner has found several cases in which the United States Supreme Court has indirectly, or through dicta, made statements concerning the accomplice instruction issue. (*Cool v. United States*, 409 U.S. 100 (1972) (Court recognizes that accomplice instructions have been in common use and represent a recognition that an accomplice may have a special interest in testifying, thus casting doubt upon the veracity of such testimony); *Washington v. Texas*, 388 U.S. 14 (1967) (dicta) (accomplice has greater interest in lying in favor of the prosecution); *On Lee v. United States*, 343 U.S. 747, reh. denied, 344 U.S. 848 (dicta) (use of accomplices raises serious question of credibility and defendant is entitled to have the issue submitted to the jury with careful instructions).)

In *Holmgren v. United States*, 217 U.S. 509 (1910) and *Caminetti v. United States*, 242 U.S. 470 (1917), perhaps the most recent United States Supreme Court cases directly dealing with the subject of accomplice instructions, the court held that where a defendant submitted a proposed accomplice instruction couched in improper form, failure to give such an instruction was not error.

As will be summarized briefly below, decisions of the various circuits have been greatly inconsistent. This court should accept this petition not only because its supervisory function over the federal courts may be exercised, but also to define with clarity its stance on the accomplice instruction issue. Such a clarification would allow for greater uniformity of decision between the various circuits as well as between courts within each circuit individually.

The District Court of Appeals for the Ninth Circuit herein, held in the case at bar that no plain error existed by reason of the failure to give accomplice instructions sua sponte because the testimony was corroborated and because the evidence revealed the motives of the accomplice in testifying. The court cited *United States v. Lee*, 506 F. 2d 111, 120-121 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975); *United States v. Ketola*, 478 F. 2d 64, 65 (9th Cir.), cert. denied, 414 U.S. 847 (1973) to support its conclusions.

Petitioner contends that even if some indirect corroborative evidence exists, failure to give the cautionary instruction sua sponte should nevertheless be deemed prejudicial error—at least where, as here, the accomplice testimony was the *only direct evidence of guilt;* where the corroboration was weak; where conviction without the accomplice testimony would have been impossible; and finally, where it was clear that the witness was in fact an accomplice.

Furthermore, the second ground of denying the appeal herein, to wit, that the jury heard evidence concerning the motives of the accomplice, should not be sufficient to negate the requirement for the instruction. Such implied "bad motive" of an accomplice is probably present in virtually every trial where an accomplice is involved. Jurors, as a matter of common sense, are likely to be aware that a participant in a crime may be testifying to gain leniency. Therefore, if this court accepts the above exception to the general

requirement for giving accomplice instructions, it would, in effect, be negating the requirement for such instructions altogether.

The following is a brief summary of the law on accomplice instructions in the various circuits. Great lack of uniformity exists.

In the First Circuit, courts have held that while it is prudent to give cautionary instructions, whether requested or not, failure to do so is not automatic error, at least where the testimony is not incredible or otherwise insubstantial on its face. (*United States v. Wright,* 573 F. 2d 68 (1st Cir.), cert. denied, 436 U.S. 949 (1978) and ovrld. on other grounds, 585 F. 2d 1113 (1st Cir. 1978); *United States v. House,* 471 F. 2d 886 (1st Cir. 1973).)

In the Second Circuit, where accomplice testimony is an important part of the government's case, it is *recommended practice* to instruct. However, such an instruction is not required unless the defendant suffers *substantial prejudice*. (*United States v. La Sorsa,* 480 F. 2d 522 (2d Cir.), cert. denied, 414 U.S. 855 (1973).)

In the Sixth Circuit, courts have apparently rejected altogether the contention that an omission of a cautionary instruction as to accomplice testimony is grounds for reversal. (*Continental Baking Co. v. United States,* 281 F. 2d 137 (6th Cir. 1960); *Tuckerman v. United States,* 291 F. 958 (6th Cir.), cert. denied, 263 U.S. 716 (1923), and ovrld. on other grounds, 399 F. 2d 896; *United States v. Finazzo,* 288 F. 2d 175 (6th Cir.), cert. denied, 368 U.S. 837 (1961).) The courts in this circuit have failed to disclose whether their decisions were affected by consideration of such circumstances as whether the accomplice's testimony was corroborated, or was weak or strong. In addition, the Sixth Circuit cases appear to misconstrue *Caminetti v.*

United States, supra, as supporting the broad view that failure to give cautionary instructions is never reversible error in the context of accomplices.

In contrast, in the Tenth Circuit, courts have held that the accomplice instruction must be given sua sponte where such evidence was the PRIMARY EVIDENCE OF GUILT or the only evidence DIRECTLY implicating the defendant, unless there is SUBSTANTIAL CORROBORATION. (*United States v. Owens,* 460 F. 2d 268 (10th Cir. 1972); *United States v. Waldron,* 568 F. 2d 185 (10th Cir.), cert. denied, 434 U.S. 1080 (1977).)

A somewhat similar standard exists in the Fifth Circuit where cases have held that a cautionary instruction was required where the government's case rested upon the testimony of a single accomplice (*Williamson v. United States,* 332 F. 2d 123 (5th Cir. 1964)), or where the accomplice's testimony lacked credibility on its face (*United States v. Garcia,* 528 F. 2d 580 (5th Cir.), reh. denied, 531 F. 2d 575, and cert. denied, 426 U.S. 952 (1976)), OR WHERE THE TESTIMONY OF AN ACCOMPLICE IS THE ONLY DIRECT EVIDENCE OF GUILT (*Tillery v. United States,* 411 F. 2d 644 (5th Cir. 1969)).

In the Seventh Circuit, varying results have been reached. Certain cases suggest that where accomplice testimony is presented, a cautionary instruction should be given and that plain error is committed where (1) the trial judge's omission is combined with another error, (2) the evidence against the defendant is weak, or (3) the accomplice testimony constitutes a crucial part of the evidence against the accused. (*United States v. Levi,* 177 F. 2d 827 (7th Cir. 1949).) Other cases within the circuit have suggested contrary results. (*United States v. Johnson,* 398 F. 2d 29 (7th Cir. 1968); see also *United States v. Wasko,* 473 F. 2d 1282 (7th Cir. 1973).)

In the Eighth Circuit, courts have held that the omission of a cautionary instruction was not reversible error unless such instruction was requested by defense counsel in a proper form and unless the accomplice testimony was uncorroborated. (*Stoneking v. United States*, 232 F. 2d 38 (8th Cir.), cert. denied, 352 U.S. 835 (1956); *Lett v. United States*, 15 F. 2d 686 (8th Cir. 1927); *Baines v. United States*, 347 F. 2d 925 (8th Cir. 1965); *United States v. Cady*, 495 F. 2d 742 (8th Cir. 1974).)

The lack of uniformity between decisions of the various circuits is due in part to this court's reluctance to address this issue in a direct manner. As noted above, at least one circuit has attempted to apply certain dicta contained in United States Supreme Court cases decided at the turn of the century. Such application, in Petitioner's opinion, is erroneous.

The court herein should accept this case in order to clarify its position on this subject, to avoid misapplication of its early decisions, and to insure uniformity of decision between the various circuits.

Conclusion.

Based on the foregoing arguments and authorities, it is submitted that this court should accept this case for a hearing on the merits.

Dated: February 5, 1981.

Respectfully submitted,

PETER N. PRIAMOS,
Attorney at Law,
Attorney for Petitioner.

APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Theresa C. Sanders, Defendant-Appellant. No. 79-1784.

Filed: Dec. 8, 1980.

Appeal from the United States District Court for the Central District of California, Robert M. Takasugi, Judge Presiding.

BEFORE: FLETCHER, ALARCON and CANBY, Circuit Judges.

Sanders appeals her conviction for conspiracy to steal United States Treasury checks.

She contends that: (1) a statement made by the bailiff to the jurors during during their deliberations constituted a denial of due process, and (2) the court's failure to give an unrequested cautionary instruction on accomplice testimony constituted plain error.

I.

Sanders argues that the statement of the bailiff, in response to a juror's question that the jury would have to return on Monday if they failed to reach a verdict by 4:00 p.m. constituted an instruction to reach a verdict.

A statement to the jury that it has to reach a verdict is coercive and reversible error, *Jenkins v. United States*, 380 U.S. 445, 446 (1964). The statement made by the bailiff was not coercive. It did not require the jurors to surrender views conscientiously held. Instead, it was an instruction that deliberations would continue if the jury had not reached a verdict within 45 minutes. An instruction to the jury to deliberate further is not coercive unless accompanied by a demand that a verdict be reached, or that the minority num-

bers should defer to the views of the majority *Walsh v. United States*, 371 F.2d 135, 136 (9th Cir.) *cert.denied*, 388 U.S. 915 (1967). The bailiff's comment was harmless and non-coercive. Under these circumstances, no evidentiary hearing was required to determine the effect of the statement on the jury.

II.

The accomplice's testimony was corroborated. Under such circumstances, it is not plain error to fail to give a cautionary instruction sua sponte, *United States v. Lee*, 506 F.2d 111, 120-21 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975).

The jury was made aware that the accomplice was testifying pursuant to a plea bargain. Failure to give a cautionary instruction sua sponte is not plain error where the evidence reveals the motives and raises questions concerning the credibility of an accomplice, *United States v. Ketola*, 478 F.2d 64, 65 (9th Cir.), *cert. denied*, 414 U.S. 847 (1973).

JUDGMENT IS AFFIRMED.

No. 80-1326

MAR 31 1981
ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1980

THERESA C. SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a bailiff's comment to the jurors during their deliberations coerced the guilty verdict against her (Pet. 7-8), and that the district court erred by not giving, *sua sponte*, a cautionary instruction on the weight to be accorded testimony of an accomplice (Pet. 9-13).

1. Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371, and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to concurrent terms of five years' imprisonment on each count; the execution of the sentences was suspended and petitioner was placed on five years' probation and ordered to make restitution in the amount of $5,175.73 (Judgment and Probation/Commitment Order dated Nov. 30, 1979).

The evidence at trial showed that petitioner was a Postal Service employee assigned to the Worldway Postal Center in May 1978. Sometime during that month, petitioner showed her son's common-law wife, Shirley Edwards, a stack of approximately 50 to 100 U.S. Treasury checks, which petitioner said she had taken from her job. Petitioner suggested that Edwards cash the checks and that petitioner and Edwards use the proceeds for bail for petitioner's son, Kenneth Sanders, who was then in jail. Edwards agreed and took several checks. She contacted one Columbus Mackey, who worked at a liquor store; Mackey agreed to cash the checks in return for a portion of the proceeds. Edwards returned to the liquor store on several occasions with additional checks (Tr. 5-7, 15-38).[1]

Edwards testified to these facts at the trial. Mackey also testified and essentially confirmed Edwards' account of the events in which he was involved (Tr. 281-291). Among the other witnesses for the government were Treasury Department and Postal Service employees whose testimony showed that the stolen checks were likely to have been in the Worldway Postal Center on May 20 and 21 (Tr. 111-130, 159) and were left in a place in the Center where they would have been visible to an employee working in the area in which petitioner worked on May 21 (Tr. 159-170, 219-220). A Secret Service Agent testified that petitioner had given inconsistent answers to his questions about, among other things, the source of the money she used for her son's bond (Tr. 326-330).

The jury began deliberations at approximately 11:00 a.m., November 2, 1979. At one point, the trial judge informed the bailiff that he would be dismissing the jury at 4:00 p.m. that day. At about 3:15 p.m., the bailiff relayed this information to the jurors, who asked what would

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[1] "Tr." refers to the Reporter's Partial Transcript of trial proceedings.

happen if they did not reach a verdict by that time. The bailiff responded that they would have to return on Monday (Pet. App. 1). At approximately 3:50 p.m., the bailiff returned to the jury room, apparently to tell the jury that it could deliberate past 4:00. Before he spoke, however, they said that they had reached a verdict. The bailiff responded that more time was available if needed (Tr. 478-479), but the jury returned to the courtroom with its verdict.

Before sentencing, petitioner moved for a new trial based on the bailiff's remarks to the jury. The district court reviewed affidavits and heard argument on the motion (Tr. 477-481). Petitioner acknowledged that there was no intentional wrongdoing by the bailiff (Tr. 477). The court denied the motion for a new trial, holding that the bailiff's "communications went through normal procedure" and did not concern the merits of the case (Tr. 479-480).

The court of appeals affirmed petitioner's conviction (Pet. App. 1-2). It held that the bailiff's comment to the jury "did not require the jurors to surrender views conscientiously held" and "was harmless and non-coercive" (*ibid.*). The court also rejected petitioner's claim that the trial judge erred by not giving a cautionary instruction, *sua sponte*, on accomplice testimony (*id.* at 2).

2. Neither of petitioner's claims merits further review by this Court.

a. On its face, the bailiff's comment contained only a neutral fact—that the court's day would end at 4:00 p.m.—and the truism that if the jury did not complete its work on Friday, it would return on Monday. The bailiff's conveying this information to the jury, while perhaps inappropriate, is not comparable to the manifestly prejudicial or coercive communications that this Court has held to require reversal. The bailiff did not pressure the jury to reach agreement after

it had announced its disagreement, see *Jenkins* v. *United States*, 380 U.S. 445 (1965), disparage the defendant or tell the jury he was guilty, see *Parker* v. *Gladden*, 385 U.S. 363 (1966), or suggest to the jury that any errors it made would be corrected on appeal, see *ibid.* Given the intrinsically innocuous nature of the bailiff's comment, the question whether it prejudiced petitioner was essentially one of fact and was resolved against petitioner by both courts below.

b. There is also no merit to petitioner's claim (Pet. 9-13) that the trial court erred by failing to give a cautionary instruction on accomplice testimony when none was requested. See Fed. R. Crim. P. 30. As the court of appeals observed (Pet. App. 2), Edward's testimony was corroborated in a variety of ways by other evidence at the trial, and the defense explored Edward's motives for testifying, including a plea agreement she had apparently reached with the government (Tr. 53). No case cited by petitioner has held that a *sua sponte* cautionary instruction on accomplice testimony is required in these circumstances.[2] In any event, the question whether the failure to give such an instruction was plain error in this case would depend on an evaluation of the particular facts and is not appropriate for this Court.

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[2]Petitioner relies on *Tillery* v. *United States*, 411 F. 2d 644 (5th Cir. 1969), *United States* v. *Owens*, 460 F. 2d 268 (10th Cir. 1972), and *United States* v. *Waldron*, 568 F. 2d 185 (10th Cir. 1977), cert. denied, 434 U.S. 1080 (1978). In *Tillery*, *supra*, 411 F. 2d at 646-647, the court held that the accomplice's testimony was effectively uncorroborated. *Waldron*, *supra*, 568 F. 2d at 187, held that where there is "a significant amount of other direct and circumstantial evidence implicating" the defendant, it is "not plain error to omit an accomplice or 'interested witness' instruction" and interpreted the earlier Tenth Circuit case, *Owens*, to be consistent with this principle (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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